

Dana J. Oliver, Esq. (SBN: 291082)  
dana@danaoliverlaw.com  
OLIVER LAW CENTER, INC.  
8780 19th Street #559  
Rancho Cucamonga, CA 91701  
Telephone: (855)384-3262  
Facsimile: (888)570-2021

*Local Counsel for Plaintiff*

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

**MARK AUSSIEKER**, individually and  
on behalf of all others similarly situated,

*Plaintiff,*

v.

**OMID AGHAZADEH d/b/a**  
**“GOLDEN CAPITAL HOLDINGS”**

*Defendant.*

Case No. 2:25-cv-00888-TLN-AC

**MEMORANDUM IN OPPOSITION TO  
DEFENDANT’S MOTION TO  
DISMISS AND STRIKE**

## INTRODUCTION

The Defendant’s Motion to Dismiss and Motion to Strike should be denied because the Plaintiff has plausibly alleged that the Plaintiff, as well as the Class, have received text messages which constitute telephone solicitations under the TCPA because they solicited the purchase of the Defendant’s real estate services. Defendant’s remaining arguments should be rejected.

## BACKGROUND AND FACTUAL ALLEGATIONS

Mr. Aussiker has brought this action to enforce the consumer-privacy provisions of the TCPA alleging that Mr. Aghazadeh violated the TCPA by making telemarketing calls to Plaintiff and other putative class members listed on the National Do Not Call Registry without their written consent. *See* ECF No. 1 (“Complaint”). The Plaintiff is, and at all times mentioned herein was, a “person” as defined by 47 U.S.C. § 153(39) and at no point did the Plaintiff consent to receiving telemarketing calls from the Defendant prior to receiving them. *Id.* at ¶¶ 14-15.

The Plaintiff’s telephone number, 906-XXX-XXXX, is a residential, non-commercial telephone number used for personal and household reasons on the Do Not Call Registry. *Id.* at ¶¶ 16-17, 20. Plaintiff has never been a customer of Aghazadeh and never consented to receive calls or text messages from him or any of his fictitiously named entities. *Id.* at ¶ 21. Despite that fact, on November 4, 2024, the Plaintiff received a text message from 209-260-1663:

Hello KIMBERLY, Came across your property in SACRAMENTO. Are you open to options to sell it?

*Id.* at ¶ 23. The Plaintiff then received another text message from that number after responding that he was not open to selling because there were people living in it.:

Do you own the property at [NN ]A[XXXXX XXXX]?

*Id.* at ¶ 24. The Plaintiff continued to receive various text messages from the Defendant and from this telephone number asking to give a proposal on the Plaintiff’s home and touted the services offered by the Defendant, using the fictitious names “Yuna Homes” and “Golden

Capital.” *Id.* at ¶ 25. Defendant openly brags on Instagram about engaging in a business called “real estate wholesaling,” which consists of cold-calling people that are potentially interested in selling their house, cold-calling people that are potentially interested in buying the house, and brokering a deal for the property and pocketing the difference; the post has been deleted but counsel for Plaintiff has a saved copy. *Id.* at ¶ 27. This activity requires a real estate broker license. CAL BUS. & PROF. CODE § 10131. *Id.* at ¶ 28. Defendant does not possess a real estate broker license. *Id.* at ¶ 29. Defendant has stated on Instagram that he made over \$750,000 last year by engaging in such illegal real estate transactions without a license and boasts of using an automated system to send as many as 25,000 text messages per day. *Id.* at ¶ 30. Defendant also brags about using automated “SMS drips” to “maximize marketing” and invites Instagram viewers to watch a six-hour “sales call marathon.” *Id.* at ¶ 31.

The aforementioned calls and text messages were all made seeking to solicit the Plaintiff to use the Defendant in the sale of a home, as well as ancillary services like connecting the Plaintiff to “investors in the SACRAMENTO area that are actively seeking to buy homes” as-is. *Id.* at ¶ 33. By Defendant’s very own admission in the messages, Defendant advertises that he will connect the Plaintiff to investors interested in purchasing the property, and pocket the difference in price, that is, collect an illegal real estate commission. *Id.* at ¶ 34. *Based on Defendant’s own admissions*, in exchange for providing these brokerage services, Defendant pockets the difference in the sales and purchase prices. *Id.* at ¶ 35. As a result, Defendant acts as and performs much the same services as a real estate agent for a commission. *Id.* at ¶ 36.

### LEGAL STANDARD

The legal standard for a motion to dismiss under Rule 12(b)(6) is well-established. Under Rule 12(b)(6), a court may dismiss a complaint that fails to state a claim upon which relief can be granted. In order to state a claim, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). Rather than require detailed pleadings, the Rules demand only a “short and plain statement of the claim showing that

1 the pleader is entitled to relief, in order to give defendant fair notice of what the claim is and the  
 2 grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, (2007) (cleaned  
 3 up). The requirement that a plaintiff “show” that he is entitled to relief means that a complaint  
 4 must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible  
 5 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). In determining whether a  
 6 claim is plausible, the court must “draw on its judicial experience and common sense.” *Connelly*  
 7 *v. Lane Constr. Corp.*, 809 F.3d 780, 786–87 (3d Cir. 2016). After identifying elements to set  
 8 forth a claim and removing conclusory allegations, the Court must accept all well-pled factual  
 9 allegations as true and determine if they give rise to relief. *Id.* A complaint may be dismissed  
 10 only where it appears that there are not “enough facts to state a claim that is plausible on its  
 11 face,” not merely because the defendant proffers some contrary facts. *Twombly*, 550 U.S. at 570.

14 Rule 12(f) permits a court to “strike from a pleading an insufficient defense or any  
 15 redundant, immaterial, impertinent, or scandalous matter.” FED. R. CIV. P. 12(f). The function of  
 16 a motion made under this rule is “to avoid the expenditure of time and money that must arise  
 17 from litigating spurious issues by dispensing with those issues prior to trial.” *Whittlestone, Inc. v.*  
 18 *Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). “While a Rule 12(f) motion provides the  
 19 means to excise improper materials from pleadings, such motions are generally disfavored  
 20 because the motions may be used as delaying tactics and because of the strong policy favoring  
 21 resolution on the merits.” *Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F.  
 22 Supp. 2d 1167, 1170 (N.D. Cal. 2010). With a motion to strike, the court views the pleading in  
 23 the light most favorable to the nonmoving party and denies the motion if there are any doubts. *Id.*

## 26 ARGUMENT

- 27 1. The messages Plaintiff received were telephone solicitations.

1 The Plaintiff clearly received telephone solicitations. The TCPA defines the term  
 2 “telephone solicitation” to include “the initiation of a telephone call or message for the purpose  
 3 of encouraging the purchase or rental of, or investment in, property, goods, or services, which is  
 4 transmitted to any person[.]” 47 C.F.R. § 64.1200(f)(15). The TCPA analysis for determining  
 5 whether a communication constitutes a “solicitation” focuses primarily on the defendant’s  
 6 purpose for initiating the communication. *See Abboud v. Circle K Stores Inc.*, No. 2:23-cv-  
 7 01683, 2025 WL 307039, at \*6 (D. Ariz. Jan. 27, 2025) (“At bottom, whether the text messages  
 8 qualify as ‘telephone solicitations’ turns on Defendant’s purpose in causing the messages to be  
 9 sent.”); *Whittaker v. Freeway Ins. Servs. Am., LLC*, No. 3:22-cv-08042, 2023 WL 167040, at \*2  
 10 (D. Ariz. Jan. 12, 2023) (“It is the purpose behind a call that controls, not what happened during  
 11 the call.”) (cleaned up); *Friedman v. Torchmark Corp.*, No. 3:12-cv-02837, 2013 WL 4102201,  
 12 at \*6 (S.D. Cal. Aug. 13, 2013) (“The Court must determine whether the intent of the call is to  
 13 offer property, goods, or services for sale during the call or in the future.”).

16 Importantly, the offering of contingent services for which no monetary outlay is required  
 17 still constitutes a “solicitation” under the TCPA. *Cacho v. McCarthy & Kelly LLP*, 739 F. Supp.  
 18 3d 195, 209 (S.D.N.Y. 2024). Here, Defendant has offered to represent the Plaintiff in the sale of  
 19 a property, by providing the Plaintiff “options to sell it.” (Compl. ¶ 23). Those options included  
 20 the offer of “real estate wholesaling,” which essentially consists of the Defendant acting as a  
 21 middleman in “brokering a deal for the property and pocketing the difference.” (Compl. ¶ 27).  
 22 This consists of including the Plaintiff to agree to sell a home and then connecting the Plaintiff to  
 23 and selling that contract to an investor for a profit. (Compl. ¶ 33, 38). This is plainly providing a  
 24 service under the TCPA. *Cacho*, 739 F. Supp. 3d 195, 209 (S.D.N.Y. 2024) (“Defendant’s offer  
 25 to represent Plaintiff clearly qualifies as an offer of services. . . . As a result . . . the challenged  
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1 calls allegedly sought to encourage *Plaintiff* to contract with Defendant and to direct a portion of  
 2 a future right to payment to Defendant. While those funds would originate from a third party, the  
 3 calls urged the relevant decisionmaker—namely, Plaintiff—to allocate those funds.”).

4 Notably, that very activity falls within the express ambit of the services covered by CAL  
 5 BUS. & PROF. CODE § 10131. (Compl. ¶ 28). The Code outlines a “real estate broker” as a  
 6 “person who . . . solicits prospective sellers or buyers of, solicits or obtains listings of, or  
 7 negotiates the purchase, sale, or exchange of real property or a business opportunity” and one  
 8 who “[s]ells or offers to sell, buys or offers to buy, or exchanges or offers to exchange a real  
 9 property sales contract.” Importantly, California courts have interpreted the offering to help a  
 10 party sell a property via the sale of a sales contract to another investor to be activity done by real  
 11 estate brokers which requires a broker’s license. *See, e.g., Venturi & Co. LLC v. Pac. Malibu*  
 12 *Dev. Corp.*, 172 Cal. App. 4th 1417, 1421, 92 Cal. Rptr. 3d 123, 127 (Cal. C.A. 2nd Dist. Div. 8,  
 13 2009) (explaining that contract for a “marketing strategy to secure financing,” and similar  
 14 services was an unlawful unlicensed brokerage contract). Nor is the Defendant a mere “finder,”  
 15 since Plaintiff alleges that the Defendant is the one providing the Plaintiff a contract to sign, and  
 16 then selling the contract for the purchase of the house to a third party. *Tyrone v. Kelley*, 507 P.2d  
 17 65, 70 (Cal. 1973) (explaining that the only exception to the licensing requirement is a “finder,”  
 18 who may only bring the “parties together so that they may negotiate their own contract,” and  
 19 explaining that if the finder “goes further and helps to conclude the transaction by taking part in  
 20 negotiating the details of the transaction, compromising or composing differences between the  
 21 parties, by way of example,” he is subject to the licensing requirements of the Code).

22 That the Defendant is providing services here, namely, the negotiation, search for, and  
 23 subsequent sale of a real estate sales contract to a network of investors, is a service the Plaintiff  
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1 is being encouraged to invest in, rendering the solicitation a telephone solicitation under the  
 2 TCPA. *See Children’s Apparel Network Ltd. v. Twin City Fire Ins. Co.*, 2019 WL 3162199, at \*4  
 3 (S.D.N.Y. June 26, 2019) (“[T]he plain meaning and common usage of the term ‘service,’ ...  
 4 includes professional services, such as legal representation and advice.”). Defendant’s offer to  
 5 represent Plaintiff clearly qualifies as an offer of services and renders it a solicitation. Courts  
 6 have straightforwardly held that a person who is solicited to pay a portion of his ultimate sales  
 7 price to an agent in exchange for listing services has purchased a service. *See McMorrow v. Core*  
 8 *Properties, LLC*, 2023 WL 8697795, at \*11 (E.D. Mo. Dec. 15, 2023) (concluding plaintiff  
 9 purchased real-estate sales services in the form of a lower sale price for his house); *see also*  
 10 *Anderson v. Catalina Structured Funding, Inc.*, 2021 WL 8315006, at \*5 (W.D. Mich. Dec. 21,  
 11 2021) (explaining when defendant provided the service of converting the plaintiff’s structured  
 12 settlement into a lump sum, that “just because the fees may be taken out of the lump sum  
 13 payment to the payee rather than itemized does not mean that no fees were charged in connection  
 14 with the transaction”), *report and recommendation adopted*, 2022 WL 3643733 (W.D. Mich.  
 15 Aug. 24, 2022). The same conclusion follows here where the services Plaintiff was solicited for  
 16 was necessarily sought by a reduction in price on the negotiated sales contract.  
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20 It is on this point that the Defendant’s citation to *Coffey* is distinguishable. In that case,  
 21 the court held that a pure offer to purchase a home, without more, was insufficient as the  
 22 messages plainly encouraged the Plaintiff only “engage in future selling activity” and not at all  
 23 encourage the plaintiff to “engage in future purchasing activity.” *Coffey v. Fast Easy Offer LLC*,  
 24 No. CV-24-02725-PHX-SPL, 2025 WL 1591302, at \*4 (D. Ariz. June 5, 2025). In other words,  
 25 all the messages and business model in *Coffey* did was to offer to *buy* the Plaintiff’s home in a  
 26 manner no different than an inquisitive neighbor calling to see if the house next door might be  
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1 for sale. As other courts have held, a *pure* offer to *buy* something *from a plaintiff* does not  
 2 constitute a telephone solicitation, for “telephone solicitations are calls intending to encourage a  
 3 purchase by the listener, not the caller. Calls asking to purchase the listener’s labor, blood, or  
 4 other service are not telephone solicitations.” *Orea v. Nielsen Audio, Inc.*, 2015 WL 1885936, at  
 5 \*3 (N.D. Cal. Apr. 24, 2015) (holding a survey call was not a solicitation, although it requires  
 6 expenditure of the recipient’s labor and information); *see also Murphy v. DCI Biologicals*  
 7 *Orlando, LLC*, 2013 WL 6865772, at \*10 (M.D. Fla. Dec. 31, 2013), *aff’d*, 797 F.3d 1302 (11th  
 8 Cir. 2015) (holding offer to obtain blood in exchange for payment was not a solicitation);  
 9 *Edelsberg v. Vroom, Inc.*, 2018 WL 1509135, at \*5 (S.D. Fla. Mar. 27, 2018) (offer to buy a car);  
 10 *Friedman v. Torchmark Corp.*, 2013 WL 1629084, at \*4 (S.D. Cal. Apr. 16, 2013) (encouraging  
 11 plaintiff to visit a free webinar offering a job).

14 But here, the Plaintiff has not pled that the Defendant merely purely offered to buy the  
 15 Plaintiff’s home. Rather, at its core, Plaintiff alleges that the Defendant charges an effective fee  
 16 for its services by negotiating with the Plaintiff for a contract to sell their house at a reduced  
 17 price and then servicing that contract by shopping it around to other investors, who will agree to  
 18 buy the purchase contract for a certain amount or percentage payable to the Defendant. The  
 19 outcome for the Plaintiff and other consumers is effectively the same: the Plaintiff is simply  
 20 purchasing the services of a realtor, albeit in a different form: shopping out the potential sale of  
 21 the house to investors rather than the general public on the MLS, all in exchange for a  
 22 commission. Many other courts have seen through this façade and found similar conduct (or  
 23 allegations) to violate the TCPA: calls advertising brokerage services plainly violate the TCPA.  
 24 A real estate brokerage advertising its “real estate brokerage services” to unrepresented  
 25 consumers is a communication “[whose] sole purpose . . . is to allow NRT to pitch its brokerage  
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1 services to the called party,” and is therefore, “made ‘for the purpose of encouraging the  
 2 purchase’ of NRT’s brokerage services.” *Chinitz v. NRT W., Inc.*, No. 18-cv-06100-NC, 2019  
 3 U.S. Dist. LEXIS 27134, at \*6-7 (N.D. Cal. Feb. 20, 2019). Whether calls constitute  
 4 “telemarketing” should be approached “with a measure of common sense.” *Chesbro v. Best Buy*  
 5 *Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2013). The Defendant’s “argument sounds a little like a  
 6 real estate buyer’s agent who tells his or her client that the home sellers will pay the fees  
 7 associated with the buyer’s agent’s services, rather than the buyer. That is ridiculous, of course:  
 8 the buyer could offer to pay less for the house if the seller did not have to pay the buyer’s agent’s  
 9 fees.” *Anderson*, 2021 WL 8315006, at \*5.

11 Building off this authority, and even more directly applicable here, several courts have  
 12 applied these same principles to deny motions to dismiss involving similar other senders of  
 13 “purchase” offers to homeowners absent prior express written consent, and in disregard of the  
 14 DNC Registry, particularly when there was some evidence (as here) that the offers were not  
 15 “pure” offers to purchase but rather offers to negotiate contracts, sell leads, or offers for other  
 16 related services. For example, in *Eagle v. GVG Capital, LLC*, the court faced even weaker  
 17 allegations to those made in this matter: the plaintiff brought claims under the TCPA against a  
 18 mass-marketing homebuyer defendant who sent repeated text messages to her cellular telephone  
 19 number, absent prior express written consent, for the purposes of inquiring regarding the  
 20 plaintiff’s interest in selling her home. No. 22-CV-00638-SRB, 2023 WL 1415615, at \*1 (W.D.  
 21 Mo. Jan. 31, 2023). The court, however, found that the allegation that the defendant necessarily  
 22 bundled ancillary services with the purchase of a home, along with the alternative allegation that  
 23 the defendant sold interested consumer leads to third party purchasers, just as here, sufficiently  
 24 alleged an actionable claim. *Id.* at \*3. Multiple other courts have held similarly under similar  
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1 circumstances. *See, e.g., Pepper v. GVG Cap. LLC*, 677 F. Supp. 3d 638, 641 (S.D. Tex. 2023)  
 2 (holding that plaintiff stated a claim where defendant was a “real estate lead generator in the  
 3 business of acquiring consumer data to assist investors and realtors buy and sell homes, for  
 4 profit,” and not both the “service provider and purchaser,” as in *Coffey*); *Helfrich v. Raven3*  
 5 *Home Buyers LLC*, No. 22-CV-03529 (PMH), 2023 WL 5956221, at \*3 (S.D.N.Y. Sept. 13,  
 6 2023) (holding calls were telephone solicitations when it was alleged that the purpose of calls  
 7 was to generate “sales and consumer leads for its salespeople”); *Wilcox v. MarketPro S., Inc.*,  
 8 No. CV SAG-23-2364, 2023 WL 8806696, at \*3 (D. Md. Dec. 20, 2023) (holding that the  
 9 content of the messages was not dispositive when plaintiffs alleged that defendant’s website  
 10 made clear that it was encouraging a “surreptitious sale of its various real estate-related services,  
 11 couched as a straightforward home-buying offer,” which transformed the “apparent offer to  
 12 purchase into a *de facto* offer to sell services”). Notably, the *Wilcox* court, *supra*, rejected the  
 13 defendant’s argument, similar to here, that the text of the messages themselves controlled, as  
 14 opposed to extrinsic evidence pled in the complaint as to the defendant’s own admitted business  
 15 model. *Accord Friedman*, 2013 WL 4102201, at \*6 (looking to intent, not content).

16 Indeed, the Court in *McMorrow* granted summary judgment *to the plaintiff* on the issue  
 17 of liability for a telephone solicitation *on the same scheme as alleged here*. There, as here, the  
 18 defendant admitted on its Facebook page that it “negotiates a sale price and a contract for sale  
 19 with the seller, and then sends the signed contract to a title company to complete the transfer of  
 20 title. [Defendant] then markets homes that it is contractually obligated to buy to individuals and  
 21 entities included on its buyer's list for either sale or assignment of the purchase contract.”  
 22 *McMorrow*, 2023 WL 8697795, at \*4. And in discovery, the template contract stated that the  
 23 defendant “contemplates or may arrange the sale of the property to another potential purchaser  
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1 and, in reliance on this agreement, has procured or anticipates procurement of a contract for such  
2 potential purchaser's purchase of the property.” *Id.* The Court concluded that this scheme offered  
3 services for an effective fee, as the “Plaintiff or other consumers lose out on either the benefit of  
4 the higher price paid by a third-party purchaser or the fee charged for the assignment of the  
5 purchase contract to a third-party purchaser.” *Id.* at \*12. This Court should do the same.

7 Nor does the TCPA implicate first amendment concerns or require pleading of actual  
8 damages. The Supreme Court has held that the TCPA appropriately and constitutionally  
9 regulates commercial speech and is constitutional as applied here. *Barr v. Am. Ass’n of Pol.*  
10 *Consultants, Inc.*, 591 U.S. 610, 623 (2020). In any event, to the extent that the Defendant raises  
11 a constitutional challenge, it has not complied with the requirements of Rule 5.1. The TCPA’s  
12 damages are statutory in nature and do not require the pleading of any concrete actual damages,  
13 either. *Los Angeles Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 804 (9th Cir. 2017) (holding  
14 TCPA provides for the greater of actual or statutory damages); *Hall v. Smosh Dot Com, Inc.*, 72  
15 F.4th 983, 988 (9th Cir. 2023) (receipt of an unsolicited text message constitutes concrete harm).

17 At bottom, the Plaintiff has included detailed allegations as to the nature of the  
18 Defendant’s business model at the pleadings stage which outlines that Defendant does not  
19 purchase homes and flip them itself. Rather, by the Defendant’s own admission on his Instagram  
20 page, he will evaluate a purchase price and negotiate a real estate sales contract, taking into  
21 account market conditions and similar factors, and then sell the contract to a buyer at an inflated  
22 price, just as in *McMorrow* and its progeny, and renders it distinguishable from *Jance* and  
23 *Hunsinger*, both of which dealt with pure offers to purchase, and not the service of contract  
24 negotiation and assignment, as here. As the California courts have already determined, this is  
25 identical, in form and function, to actions performed by a real estate broker, whose services are  
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1 unquestionably subject to the TCPA's prohibitions.

2 2. The class should not be struck.

3 Defendant claims that the Plaintiff's classwide allegations should be struck at the  
4 pleadings stage on the purely conclusory grounds that the Plaintiff has failed to plead a common  
5 message, and that the Plaintiff has failed to plead numerosity, commonality, ascertainability, or  
6 typicality. These underdeveloped challenges must fail. Nothing about the class claims here  
7 requires that they be *struck* at the pleadings stage, in the absence of any factual record or  
8 discovery. Dismissing class allegations at the pleading stage is rare because "the parties have not  
9 yet engaged in discovery and the shape of a class action is often driven by the facts of a  
10 particular case." *In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 505 F. Supp. 2d 609, 615-16  
11 (N.D. Cal. 2007). As such, striking class allegations at this juncture "would be inconsistent with  
12 the type of 'rigorous analysis' that this court would endeavor to undertake in deciding whether to  
13 ultimately certify a class." *Mattson v. New Penn Fin., LLC*, No. 3:18-CV-00990-YY, 2018 WL  
14 6735088, at \*2 (D. Or. Nov. 6, 2018) (denying similar motion to strike in TCPA case).

15 As to the first and third points, Defendant commits a critical error, conflating Plaintiff's  
16 standing to represent class members asserting a common *claim*, founded in same legal theory  
17 with similar conduct and common questions, with the uniformity of the evidence and the *proofs*  
18 used to narrow and address issues in the resultant class list. *Mantha v. QuoteWizard.com, LLC*,  
19 347 F.R.D. 376, 394 (D. Mass. 2024) ("[T]ypicality [is] satisfied if class representative's injuries  
20 arose from 'same events or course of conduct' and his claims are 'based on the same legal  
21 theory.'"). It is well-established in the class action context generally and the TCPA class action  
22 context specifically that factual differences as to proof of class members' claims do not preclude  
23 class certification, so long as those factual differences are either immaterial to the claims'  
24 elements or otherwise susceptible to categories of generalized proof. *E.g., Kolinek v. Walgreen*  
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Co., 311 F.R.D. 483, 491–92 (N.D. Ill. 2015) (emphasis added):

Kolinek’s claim that Walgreens violated the TCPA when it placed a prerecorded prescription reminder call to his cellular phone satisfies Rule 23(a)’s typicality requirement because the class consists of all persons who received such calls. *The number of times other class members received prescription reminder calls is immaterial to the question whether those claims arise from the same course of conduct and share a common legal theory.* See also *Toney v. Quality Res., Inc.*, 323 F.R.D. 567, 584–85 (N.D. Ill. 2018) (“[plaintiff] shares claims that are typical to each proposed class member because she received a call from Quality to her cell phone marketing a Sempris product, like the other proposed class members.”); *Hand v. Beach Ent. KC, LLC*, 456 F. Supp. 3d 1099, 1142 (W.D. Mo. 2020). “[T]he TCPA does not contemplate a content-based restriction on actionable calls—it prohibits *all* calls sending prerecorded messages to certain individuals without consent, *regardless of the content of the messages.*” *Starling v. KeyCity Cap., LLC*, No. 3:21-CV-818-S, 2022 WL 198403, at \*5 (N.D. Tex. Jan. 21, 2022) (emphasis added). Thus, that the Defendant sent different *content* advertising its services to different people does not render the class atypical. Courts routinely certify classes, as in *Kolinek*, where class members were sent different content all alleging the same thing.

Nor does the plaintiff fail to allege numerosity, commonality, or ascertainability. Although “[a] defendant may move to deny class certification before a plaintiff files a motion to certify a class” under Federal Rule of Civil Procedure 23, *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 941 (9th Cir. 2009), that is not the approach Defendant takes here. Instead, Defendant seeks to strike the class allegations in the Complaint pursuant to Rule 12(f). Courts in the Ninth Circuit in particular generally disfavor motions to strike allegations because “a motion for class certification is a more appropriate vehicle.” *Lyons v. Coxcom, Inc.*, 718 F. Supp. 2d 1232, 1235-36 (S.D. Cal. 2009). Thus, courts have held that resort to Rule 12(f) is improper “where the issues raised in the motion to strike are the same ones that would be decided in

1 connection with determining the appropriateness of class certification under Rules 23(a) and  
 2 23(b).” *Rahman v. Smith & Wollensky Restaurant Group, Inc.*, 2008 WL 161230, \*3 (S.D.N.Y.  
 3 2008). Here, the issues the Defendant raises in a conclusory fashion without further argument or  
 4 development, “are the same issues that will be decided when determining whether to grant class  
 5 certification.” *Abboud*, 731 F. Supp. 3d 1094, 1108. The proper procedural mechanism for  
 6 challenging the Plaintiff’s class claims lies at class certification, not at the pleadings stage. The  
 7 issues Defendant raises: numerosity, commonality, and ascertainability, are exactly the very  
 8 issues that will be litigated and decided in the context of a motion for class certification and are  
 9 thus procedurally premature at this stage. *Id.*

11 Defendant has pled no facts supporting his conclusory assertion that the plaintiff cannot  
 12 meet the basic elements of Rule 23, and the two authorities to which Defendant cites are not even  
 13 TCPA cases that have no seeming applicability to the case at bar. In *John*, the Fifth Circuit  
 14 struck class certification of an insurance policy class action where the class members were  
 15 unascertainable because class membership hinged on a myriad of individualized policy  
 16 evaluation determinations. *John v. Nat’l Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007).  
 17 And in *Wright*, the Northern District of Illinois refused to certify a wage and hour class because  
 18 unique defenses as to which managers promoted off-the-clock work contrary to company policy  
 19 would necessitate individualized mini-trials to adjudicate unique defenses. *Wright v. Fam.*  
 20 *Dollar, Inc.*, No. 10 C 4410, 2010 WL 4962838, at \*3 (N.D. Ill. Nov. 30, 2010).

23 By contrast, Courts in the Ninth Circuit and elsewhere routinely remark of the propriety  
 24 of certifying TCPA class actions because of their susceptibility to classwide proof. *See, e.g.*,  
 25 *Krakauer v. Dish Network, L.L.C.*, 925 F.3d 643, 655–56 (4th Cir. 2019) (“The private cause of  
 26 action in § 227(c)(5) offers many advantages for class-wide adjudication” because, among other  
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1 things, “the liability determinations involve no questions of individual reliance . . . [and] the  
 2 damages calculations do not turn on individual evidence.”); *Ira Holtzman, C.P.A. v. Turza*, 728  
 3 F.3d 682, 684 (7th Cir. 2013) (“Class certification is normal [in TCPA cases] . . . because the  
 4 main questions . . . are common to all recipients.”); *Sandusky Wellness Ctr., LLC v. Wagner*  
 5 *Wellness, Inc.*, No. 3:12 CV 2257, 2014 WL 6750690, at \*5 (N.D. Ohio Dec. 1, 2014)  
 6 (discussing remarkable commonality of TCPA cases).

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 8 Nor do the Defendant’s unwarranted and unsupported inferences that the Plaintiff has  
 9 some sort of alleged ulterior motive justify striking the Plaintiff’s class allegations at the  
 10 pleadings stage. All the Plaintiff’s email correspondences reveal is that Mr. Aussieker engaged in  
 11 an investigation and attempt to resolve his claims against the Defendant. Notwithstanding the  
 12 fact that the Defendant is attempting to introduce extrinsic evidence in the form of inadmissible  
 13 Rule 408 communications in the context of his motion to dismiss, they account for little, as  
 14 another judge has observed with respect to far more problematic communications where a  
 15 plaintiff was alleged to have stated that he was “pillaging” a defendant:  
 16

17 The Amended Complaint also points to transcripts of conversations in which Mr. Shelton  
 18 discussed his litigation strategy. . . . That pecuniary approach to litigation might be  
 19 unseemly, as the Court has observed before. But it is not illegal. *Certainly, it does not*  
 20 *demonstrate that Mr. Shelton intends to cheat or defraud anyone.* It only shows that he  
 21 intends to collect if he prevails in litigation.

22 *Jacovetti L., P.C. v. Shelton*, No. 2:20-CV-00163-JDW, 2020 WL 5211034, at \*3 (E.D.  
 23 Pa. Sept. 1, 2020) (emphasis added). Outlining a party’s potential arguments, arguing for a  
 24 potential defendant’s exposure, and offering to settle the case, prior to deciding whether or not it  
 25 is prudent to litigate those claims, is not evidence of bad faith or maliciousness on the part of the  
 26 Plaintiff. It certainly does not warrant striking the pleadings on some wild allegation of  
 27 inadequacy on the utterly false basis that the Plaintiff is engaging in business dispute with a  
 28 competitor. Rather, it is a component of a sound strategy, shows proper allocation of resources,

1 and concern for the court’s time. The mere fact Mr. Aussieker attempted to negotiate an  
 2 extrajudicial resolution does not render them unenforceable. “The TCPA does not merely  
 3 contemplate self-interested plaintiffs—it encourages them.” *Cunningham v. Rapid Response*  
 4 *Monitoring Servs.*, 251 F. Supp. 3d 1187, 1197 (M.D. Tenn. 2017). As the Court in *Cunningham*  
 5 elucidates on in expressly rejecting the very notion Defendant advocates for here:

7       The determinative issue, then, is not Cunningham’s motivations, but whether he was  
 8 injured. . . . *It may be that Cunningham was not saddened or annoyed by the calls he*  
 9 *received; it may even be that, knowing his rights under the TCPA, he is glad the calls were*  
 10 *placed.* But allowing that fact, even if true, to negate his right to privacy and seclusion  
 would require the Court to embrace a line of reasoning that would ultimately undermine  
 the rights of most, if not all, TCPA plaintiffs and plaintiffs in similar statutory schemes.

11       *Cunningham*, 251 F. Supp. 3d at 1196 (cleaned up) (emphasis added). Significantly,  
 12 because “the TCPA is ‘a consumer protection statute which is remedial in nature,’ this Court  
 13 must interpret the statute broadly” and certainly not allow it to be turned on its head and  
 14 weaponized against consumers.” *Heard v. Nationstar Mortg. LLC*, No. 16-cv-00694- MHH,  
 15 2018 WL 4028116, at \*5 (N.D. Ala. Aug. 23, 2018). “Because the TCPA is a remedial statute, it  
 16 should be construed to benefit consumers.” *Gager v. Dell Fin. Servs., LLC*, 727 F.3d 265, 271  
 17 (3d Cir. 2013). “Courts should exercise caution when striking class action allegations based  
 18 solely on the pleadings, because class determination generally involves considerations that are  
 19 enmeshed in the factual and legal issues comprising the plaintiff’s cause of action.” *Sauter v.*  
 20 *CVS Pharmacy, Inc.*, No. 2:13-CV-846, 2014 WL 1814076, at \*2 (S.D. Ohio May 7, 2014). The  
 21 Plaintiff’s protected Rule 408 communications provide little basis to justify striking the class  
 22 claims, either. This Court must refuse to strike the Plaintiff’s well-pled class claims.

## 25 CONCLUSION

26       For the foregoing reasons, the Defendant’s Motion to Dismiss and Strike should be  
 27 denied and the case proceed or leave to amend granted to correct deficiencies as necessary.  
 28

1 Dated: June 25, 2025

2 s/Andrew Roman Perrong  
3 Andrew Roman Perrong  
4 (Pro Hac Vice)  
5 a@perronglaw.com  
6 Perrong Law LLC  
7 2657 Mount Carmel Avenue  
8 Glenside, PA 19038  
9 215-225-5529  
10 Lead Attorney for Plaintiff and the Proposed Class

11 **CERTIFICATE OF SERVICE**

12 I certify that I filed the foregoing via ECF on the below date, which will automatically  
13 send a copy to all parties of record on the case.

14 Dated: June 25, 2025

15 s/Andrew Roman Perrong  
16 Andrew Roman Perrong  
17 (Pro Hac Vice)  
18 a@perronglaw.com  
19 Perrong Law LLC  
20 2657 Mount Carmel Avenue  
21 Glenside, PA 19038  
22 215-225-5529  
23 Lead Attorney for Plaintiff and the Proposed Class